

***United States Court of Appeals
for the Second Circuit***



**PETITIONER'S
BRIEF**

ORIGINAL
77-4083

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

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THE LONG ISLAND COLLEGE HOSPITAL, :
Petitioner, : Petition to Review
- against - : and Set Aside an
NATIONAL LABOR RELATIONS BOARD, : Order of the National
Respondent. : Labor Relations Board
-----x
Docket No. 77-4083

PETITIONER'S BRIEF

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THE LONG ISLAND COLLEGE HOSPITAL, :
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NATIONAL LABOR RELATIONS BOARD, : 77-4083
Respondent. :
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PETITIONER'S BRIEF

STATEMENT OF THE ISSUES
PRESENTED FOR REVIEW

1. Did the National Labor Relations Board ("Board") unlawfully abdicate its exclusive responsibility under the National Labor Relations Act ("Act") to decide for itself what constitutes an appropriate collective bargaining unit at The Long Island College Hospital ("Hospital") when it rubber-stamped, under the guise of comity, a 1964 decision of the New York State Labor Relations Board ("SLRB") finding that a unit limited to the maintenance employees at the Hospital was appropriate under the New York State Labor Relations Act?

2. Does substantial evidence on the record considered as a whole support the Board's conclusion, which it reached without considering the record, that a small gerry-

mandered group of 69 maintenance employees, out of about 609 service and maintenance employees at the Hospital, constitutes an appropriate bargaining unit?

3. Is the Board's order too broad, assuming, contrary to law and fact, that the Hospital violated the Act when it refused to bargain with the Union to test, in the only way the Hospital could, the appropriateness of a bargaining unit limited to the Hospital's maintenance employees?

STATEMENT OF THE CASE

A. Nature of the Case

The Hospital is petitioning this Court, pursuant to section* 10(f) of the Act, 29 U.S.C. §160(f), to review and set aside an order of the Board dated February 9, 1977 and reported at 228 NLRB No. 13 that, inter alia, directs the Hospital to bargain with Local 144, Hotel, Hospital, Nursing Home & Allied Services Union, Service Employees International Union, AFL-CIO ("Union") (521-22)* as the exclusive collective bargaining representative of an inappropriate bargaining unit limited to the Hospital's maintenance employees simply because that unit was found appropriate under the New York State Labor Relations Act. New York Labor Law §§700-17. The Board's decision is contrary

* Numbers in parentheses refer to pages of the Joint Appendix.

to the Third Circuit's decision in Memorial Hospital of Roxborough v. NLRB, 545 F.2d 351 (3d Cir. 1976), which the Board expressly refused to follow, stating:

"With all due respect for the views expressed by the Court of Appeals for the Third Circuit in its opinion in Memorial Hospital of Roxborough v. N.L.R.B. [citation omitted], we respectfully adhere to the Board majority's opinion in that case, reported at 220 NLRB No. 73 (1975), until such time as the Supreme Court shall have passed on the matter." (521)

The Board has cross-petitioned to enforce its order. On June 7, 1977, the Union applied to intervene as a respondent.

B. Course of Proceedings

This case began before the Board on September 8, 1975 when the Union filed a charge with the Board's Regional Director for Region 29 alleging that the Hospital had refused unlawfully to bargain with it (2). On December 13, 1975, the Regional Director issued a complaint based on the charge (3-7). The Hospital answered on January 27, 1976 denying that it had violated the law and setting forth certain affirmative defenses (8-13). On June 4, 1976, the Board's Administrative Law Judge ("ALJ"), who presided at the hearing on the complaint on March 9 and 10, 1976, issued a Decision and Recommended Order directing the Hospital, among other things, to bargain with the Union as the exclusive collective bargaining agent of a small balkanized unit limited to the

Hospital's maintenance employees simply because the SLRB had found that unit appropriate under the New York Labor Relations Act in 1964 (486-97). After the Hospital filed exceptions, the Board, on July 8, 1976, adopted the ALJ's Decision and Recommended Order as its own adding only the footnote rejecting the Third Circuit's contrary holding, which we quote at page 3, supra (500-13, 521-22).

STATEMENT OF FACTS

The Hospital is a 567 bed non-profit hospital serving the people of Brooklyn (145). It employs approximately 2200 employees (154), including approximately 540 service employees and 69 maintenance employees (154-55, 167-68) who all work together and enjoy common wages, benefits and other terms and conditions of employment. The Board, adopting its ALJ's decision that these maintenance employees alone constitute an appropriate unit, relied solely and exclusively on the SLRB's 1964 certification of the Union as the representative of the maintenance employees to support the appropriateness of this fragmented unit that is wholly inappropriate by the Board's own standards. (521-22)

1. State Proceedings

Fourteen years ago, on July 1, 1963, the Union filed a petition with the SLRB that led to the SLRB's stale certification upon which the Board now exclusively relies.

Before the SLRB, the Union claimed, contrary to its present claim, that the Hospital's "service and maintenance employees, including employees in the maintenance of plant and engineering department, constitute a unit appropriate for the purposes of collective bargaining." (526) The SLRB would have directed an election in a service and maintenance unit had not another labor organization, Maintenance Division of the Building and Construction Trades Council ("BCTC"), filed another petition on March 26, 1964 seeking to represent a separate maintenance unit.* Thereafter, the SLRB consolidated both cases and, over the objections of both the Hospital and the Union, directed that simultaneously with the election the SLRB would hold for the service employees with only the Union on the ballot, the maintenance employees be given a self-determination election with both the Union and BCTC on the ballot.

The SLRB went on to hold that

"[i]f a majority of the [maintenance] employees. . . , voting in the self-determination election, vote in favor of a separate unit, we shall find such a unit appropriate" and also find a service unit appropriate, but "[i]f a majority of the maintenance. . . employees, voting in the self-determination election, do not signify a desire to bargain sepa-

* The SLRB noted that "where no claim of representation has been made for a separate unit of skilled engineering maintenance department employees, we have found a combined service and maintenance unit to be appropriate." (529)

rately, we shall find appropriate a single unit comprised of them and the service employees." (533)

Contrary to the ALJ's finding (491), the SLRB conducted the elections on July 22, 1964 (14-15) quite differently from the way the Board conducts a "Globe" election. Globe Machine and Stamping Co., 3 NLRB 294, 299-300, 1A LRRM 123, 125-26 (1937). In a "Globe" election, an employee in the voting unit the appropriateness of which depends on the election's outcome, answers a single question -- "Do you wish to be represented for the purposes of collective bargaining by the union seeking the smaller unit, by the union seeking the combined unit or by neither union?" -- by making a single mark on his ballot. If a majority votes for the union seeking the smaller unit, the Board finds the smaller unit appropriate and certifies that union as the representative of the employees in that unit. On the other hand, if a majority does not vote for the union seeking the smaller unit, the Board finds the combined unit appropriate, pools all the ballots cast in the smaller unit with the other ballots cast in the election, accords each ballot cast for the union seeking the combined unit or for neither union its face value and counts each ballot cast for the union seeking the smaller unit as a valid ballot in determining the total number of votes cast. NLRB Case Handling Manual, Part II, §11340.8(b); Union Carbide Corporation Chemicals Division, 156 NLRB 634, 642, 61 LRRM 1109 (1966).

The SLRB, however, asked the voters in the smaller unit -- the maintenance employees -- these three confusing questions:

- "1. Do you want a separate bargaining unit limited only to maintenance... employees? (to be answered 'Yes' or 'No')
- "2. If there is a separate unit of maintenance...employees, do you then desire to be represented for the purposes of collective bargaining by [BCTC], or by [the Union], or by neither?
- "3. If there is a combined unit of maintenance...employees and service employees, do you then desire to be represented for the purposes of collective bargaining by [the Union]? (to be answered 'Yes' or 'No')" (533-34)

47 out of 55 eligible maintenance employees voted. On the first question, 21 employees voted in favor of a separate maintenance unit, five voted against it, one voter was challenged and understandably 20 ballots were blank. On the second question, 24 voters favored the Union, four voted for BCTC, 16 voted "neither", two voters left the question blank and one voter was challenged. The SLRB did not tally the ballots on the third question (14-15).

The service employees voted 309 to 151 against the Union -- a margin greater than 2 to 1 (140). Hence, if the SLRB had either (1) conducted the election in the service and maintenance unit in accordance with the Union's request,

or (2) pooled the ballots under the Board's Globe doctrine, the Union would have lost 325 to 175.

The Hospital objected to the SLRB election because of the SLRB's bargaining unit determination, its decision permitting BCTC to file a petition and consolidating its petition with the Union's, and to

A. The "complex, complicated and confusing" English only ballot the SLRB used that prevented the maintenance employees, from expressing their wishes with respect to representation and unit placement by making a single mark on their ballots (559);

B. The SLRB tallying the ballots contrary to its own Decision, Order and Direction of Election because, had the SLRB tallied the ballots correctly, the SLRB would not have found a maintenance unit appropriate and the Union would not have been certified (561); and

C. The Union's conduct before and during the election that interfered with the maintenance employees' free choice of bargaining representative, including the Union's president invading the voting area while the polls were opened and voters were there, and the Union distributing to the voters on the eve of the election material misrepresentations about wages and benefits at other hospitals where it represented employees, and about SLRB proceedings involving other hospitals, to all of which the Hospital did not have an adequate opportunity to reply (563-567).

But, the SLRB overruled the Hospital's objections without a hearing and certified the Union as the representative of the maintenance employees on December 24, 1964 (14-15).

When the Hospital refused to bargain to test the validity of the SLRB's certification, the Union stubbornly refused to file a refusal to bargain charge, but instead, as the New York Court of Appeals found, delayed the case for five years pursuing an inappropriate arbitration remedy under Section 716 of the New York Labor Law. Long Island College Hospital v. Catherwood, 23 N.Y.2d 20, 39, 294 N.Y.S.2d 697, 705-06, 241 N.E.2d 892, 898 (1968), appeal dismissed, 394 U.S. 716 (1969).

Five more years were consumed in litigating the Union's belated unfair labor practice charge, resulting again in a denial of certiorari by the United States Supreme Court on March 4, 1974. Long Island College Hospital v. N.Y. State Labor Relations Board, 415 U.S. 957 (1974), denying cert. to, 32 N.Y.2d 314, 345 N.Y.S.2d 449, 298 N.E.2d 614 (1973).*

The New York Court of Appeals' 1973 decision upheld the SLRB's maintenance unit finding as the lesser of the two evils New York law mandated, as follows:

"Actually, the board's practice in allowing skilled maintenance employees in hospitals to form a separate bargaining unit if they wish to do so, far from constituting over-compartmentalization, has avoided more serious fragmentation into numerous smaller units since, under the mandatory craft unit

* In this opinion, the New York Court of Appeals did not blame the Union for the additional five year delay, but just as clearly, contrary to the ALJ's finding (494), it did not blame the Hospital.

provision of subdivision 2 of section 705,
each skilled craft, such as plumbers, paint-
ers and carpenters, could have demanded and
could have been included in a separate unit."
32 N.Y.2d at 323, 345 N.Y.S.2d at 455, 298
N.E.2d at 618.* (Emphasis added)

The Hospital bargained in good faith with the Union following the Supreme Court's refusal to review the New York Court of Appeals' decree, but without prejudice to its position that the maintenance unit was inappropriate (6, 141, 355-56), but when the Hospital learned that the Board's Regional Director for Region 2 had refused to issue a complaint in Society of New York Hospital, Case No. 2-CA-13708 (1975) (137-38), which, exactly like this case, involved a labor organization's reliance on an ancient SLRB certification of an inappropriate maintenance unit, the Hospital, on August 14, 1975, declined to bargain further, particularly in view of the substantial changes in its operations and personnel since the SLRB issued the certification in 1964 (6, 11, 137-38, 141-42). This proceeding followed.

* Section 705(2) of the New York Labor Law limits the SLRB's discretion in determining appropriate units by providing, in pertinent part, as follows:

"2. ...provided, however, that in any case where the majority of employees of a particular craft, or in the case of a non-profitmaking hospital or residential care center where the majority of employees of a particular profession or craft, shall so decide the board shall designate such profession or craft as a unit appropriate for the purpose of collective bargaining."
(Emphasis added.)

2. Thirteen Years of Change

Although the Board expressly refused to consider the facts at the Hospital on the unit question, choosing instead to ignore the Act and grant comity to the SLRB's unit determination under the New York statute, during the years between 1964 when the SLRB issued its certification, and 1976, when the hearing before the Board was held, the Hospital had undergone radical changes in its maintenance department's organization, and in its facilities, plant and equipment, methods of operation and personnel that preclude giving comity to the SLRB certification even if the Act did not preclude the Board from giving comity to another body's unit determination, which is not the case, and even if the New York State Labor Relations Act and the Act had compatible material provisions and were administered compatibly, which also is not the case.

(i) Changes in Buildings and Equipment. In 1964 the Hospital consisted of two in-patient buildings -- its main building at 340 Henry Street in Brooklyn, and the Prospect Heights Pavilion on Washington Avenue, approximately a 20 minute drive away. In addition, the Hospital operated various brownstones and other buildings as offices and residences within 2 blocks of the Henry Street building (151-52).

Since 1964 the Hospital acquired many additional brownstones and ceased operating many others. The Hospital

also began operating many outlying out-patient facilities, including the Brooklyn Kidney Center on Sterling Place and Flatbush Avenue, a methadone clinic on Court Street and another on Sullivan Place, a neighborhood health clinic on Clinton Street, an alcoholic clinic on Court Street and a warehouse on Furman Street (152-53, 180, 312).

The most basic change in its facilities, however, took place in 1974 when the Hospital, in order to provide the people of Brooklyn with the most modern health care services, opened the new acute care hospital building on Atlantic Avenue, which is connected to the Henry Street building by a bridge, closed the Prospect Heights Pavilion, and eliminated 75 per cent of the patient beds at the Henry Street building (153-54, 283, 285-86, 312).

A complete change in the Hospital's engineering systems at its in-patient facilities accompanied these changes in location and, in the thirteen years since the SLRB issued its certification, the Hospital has advanced and simplified its plant and equipment technology even more than medical science has advanced (319).

For example, both the Prospect Heights and the Henry Street buildings used costly high pressure boilers in 1964. In 1970, the Hospital converted the Prospect Heights Pavilion to a low pressure heating plant and it installed a

low pressure heating plant in the Atlantic Avenue building. This eliminated seven or eight firemen and watch engineers who had manned the high pressure boilers at the Prospect Heights Pavilion since low pressure boilers do not need to be watched (158, 169).

The Hospital converted its manually operated elevators to self-service during this period as well (376-77). In 1964, the Hospital had only a few small room air-conditioners, but since then it has installed two independent central air conditioning systems (215-17, 249-50, 318).

The Hospital even has changed the way in which it disposes of its garbage -- another maintenance function. The old fashioned incinerators in the Henry Street building and the Prospect Heights Pavilion have been replaced by a new Somat machine in the Atlantic Avenue building that converts garbage to flakes for disposal (246).

(ii) Changes in Departmental Organization. The Hospital has reorganized its maintenance department to keep up with its physical changes. Two Directors of Engineering -- Mr. Fein and then Mr. Cregan -- have succeeded the director who held that position in 1964 (144-45, 173). Instead of one group of employees all reporting directly to the Director of Engineering, the Hospital, after experimenting with alternative employee groupings, divided the employees into five major

functional groups with the supervisor of each reporting to the Director of Engineering (172-73, 190, 208-09, 218-19, 241) thereby eliminating area maintenance and easing communications between the maintenance employees and the other Hospital employees (157-60).

(iii) Changes in Personnel and their Wages and Benefits. Notwithstanding the Hospital's substantial and increasing subcontracting and its elimination of the old single purpose craftsmen and most licensed boiler operators, the Hospital's maintenance employees increased from 55 employees to 69 employees since 1964 (14-15, 283-85, 317-18, 390). Of the 69 non-supervisory, non-clerical maintenance employees that the Hospital employed at the time of the hearing before the ALJ only eight (11.6%) were employed at the time of the 1964 SLRB election (359-60, 361, 390, 441, 454); whether any one or more of these eight employees voted at all or were among the 24 voters who voted for the Union will never be known.

Not only wages, but many benefits that the Hospital provides all its employees, including maintenance employees, have been changed or introduced since 1964 (369-73, 389).

(iv) Changes in and Current Job Duties. The changes in equipment and buildings to be maintained changed the jobs the employees perform. The unit the SLRB mistakenly

described as consisting of "skilled employees in the maintenance and engineering department", including "watch engineers, locksmiths, carpenters, electricians, masons, painters, helpers, maintenance men and handymen" is gone (528, 378-79). None of the "skilled" jobs remain, except watch engineers whose numbers have been halved and now number five (mostly part-time employees) out of the 69 in the department (154-55, 169, 190, 284).

Several years ago, in order to increase flexibility, and as all but eight of the skilled craftsmen employed in 1964 were replaced by less skilled men, the former "craft" job titles, e.g., plumber, electrician, etc., were replaced by skill level job titles, e.g., laborer, maintenance man and lead maintenance man (170, 262, 409). All of the maintenance men, even the handful who have adapted least well to the new system, perform work in addition to their predominant tasks (170-71, 294, 315-16, 481). An air conditioning crew of four men and a supervisor had to be created (209). The locksmith is now more logically in the security department (157). An expediter's job was totally eliminated and a new preventive maintenance man added (410, 421-22). Incinerator men were included in the department and one of them became a Somat operator (246, 457-58).

3. The Single Community of Interest

The Hospital's 69 non-clerical, non-supervisory maintenance employees* work throughout both the Henry Street and Atlantic Avenue buildings, the nearby brownstones and as far away as the Furman Street warehouse under common supervision with other employees.

(i) Common Supervision. Mr. Fein, the Associate Administrator for Support Services (20, 144),** supervises employees other than maintenance employees, and the Director of Engineering, Mr. Cregan, does too. Mr. Fein runs the Hospital's laundry department that employs laundry employees, the housekeeping department that employs maids and porters, and the security department that employs guards (20, 147, 149-57).

Mr. Cregan is likewise responsible for the materials clerks in the engineering department whom the SLRB expressly and specifically excluded from the maintenance unit (290, 201-03, 422, 528). They and the employees in the inappropriate unit the SLRB certified work as a team with non-engineering department receiving and purchasing clerks to unload trucks full of supplies (292-93, 301-03). The engineering department

* These employees are classified as follows: 2 incinerator men, 8 laborers, 5 helpers, 6 firemen, 36 maintenance men, 3 lead maintenance men, 1 refrigeration mechanic, 1 preventive maintenance man, 2 boiler mechanics and 5 watch engineers (173, 190, 209, 219, 242).

** Mr. Fein reports directly to the Hospital's Chief Executive Officer (20, 146).

materials clerks are hospital clerical employees, i.e., service employees under NLRB standards. St. Catherine's Hospital, 217 NLRB 787, 89 LRRM 1070 (1975), Newington Children's Hospital, 217 NLRB 793, 89 LRRM 1108 (1975).

Mr. Cregan supervises these clerks along with the other maintenance employees (301). Moreover, in the evenings, at nights and on weekends and holidays, when no engineering department supervisor is on duty, the maintenance employees on duty report directly to the assistant director of nursing who supervises all other employees in the Hospital as well (166-67). And, supervisors in other departments effectively recommend discipline of maintenance employees (390-91).

(ii) Common Duties and Work Contacts. Each and every maintenance employee has significant and substantial contact on the job with employees outside the engineering department with whom they work as a team.

The two incinerator men operate the Somat machine in the Atlantic Avenue building and the incinerator in the Henry Street building. They have substantial contact with people from the dietary, laboratory and housekeeping departments who bring them garbage. Indeed they work hand in hand with these employees, as a team, lugging heavy bags of garbage into place (199-200, 247, 317).

The five watch engineers are the only employees in the unit required to be licensed (190). Most of them are part-time per diem employees (284). Primarily they are responsible for the operation and maintenance of the boilers, but they also do all kinds of maintenance work throughout the Hospital, particularly during the 130.5 hours (out of a total of 168 hours) of every non-holiday week that most of the engineering staff is not on duty (191-93). Even during the basic 37.5 hour workweek that the maintenance men are at work, the watch engineers respond to emergencies throughout the Hospital and have substantial telephone contact with service employees while taking trouble calls (191-93).

Throughout the day shift the two boiler mechanics repair the many miles of piping and fix the many radiators and other devices throughout the Hospital (194-95, 459-62).

The parties stipulated at the hearing that the thirty-six maintenance men (over half of the unit) work

"throughout the hospital at the request of whoever works in the area where the maintenance work needs to be done; on going into an area (except in obviously public areas such as where there is a light out in the middle of the hall) maintenance men check with whoever is in charge of that area, whatever department it may be and are told what it is that needs to be done" (228-29, 230, 231; cf. 192-94, 197-98, 213-14).

The remaining employees in the unit, like the 36 maintenance men, work with the maintenance men and with other employees throughout the Hospital. The 19 laborers, helpers and firemen are assistants to the maintenance men, work with them or alone and clean up for them throughout the Hospital (178-79, 198-99, 222, 248, 460). Similarly, four other employees, the three lead maintenance men and the one refrigeration mechanic work throughout the Hospital doing much the same work as the maintenance men (177, 209-10, 211-14, 218, 221).

The "checking in" process, through which the maintenance men and their more skilled or less skilled counterparts (59 of the 69 unit employees) contact nurses aides, housekeeping employees, clerks, technicians, guards, nurses, or supervisors (174-75, 196-97, 212, 220, 237-38), learn from them the specific nature of the problem and gain access to the area where the work must be done, is the least of the maintenance employee's contacts with the other Hospital employees, however. Supervisors in other departments often tell the maintenance men to go away and come back later (212), and these supervisors, who ordered the work to be performed, must sign off when it is completed, even for the simplest repairs (15, 295-96). The maintenance men tell employees in other departments who use the equipment the maintenance men fix how to keep the equipment running well (212-13).

On a day-to-day basis, the maintenance employees work alongside service employees (161-62, 287-88). The maintenance men fix leaking pipes while housekeeping employees mop up the leaks (161, 234, 288), and complete alterations or repairs while housekeeping employees clean toilets, windows, beds, and floors, and dietary workers serve food, in the same room (177-78, 235, 254-55, 466-67).

The maintenance employees and service employees go beyond working together in the same room -- they actually work together as a team on the same job. For example, the maintenance employees help the employees assigned to the area where leaks occur move their equipment to dry places (161, 288) and help housekeeping employees mop up the water (235, 238). Porters help maintenance employees move air conditioning units from windows to hallways, pulling together to do the job (256-57). And locksmiths and maintenance men work together installing locks (236).

Maintenance employees constantly work with other employees moving equipment. This teamwork is not limited to major moves as from the two old buildings to the new one in 1974 or the moves of the kidney dialysis unit or computer center -- rather maintenance employees and employees from other departments move equipment together throughout the Hospital on a daily basis (162-63, 179-80, 181, 235).

Each day a team of one maintenance man, one nurse's aide and one housekeeping employee moves beds from room to room in the Henry Street building. They work together taking doors off their hinges, holding the doors while and after they are taken down, pushing the beds from one room to another, and putting the doors back on their hinges after completing the move (181, 279-80, 298). Again, when repairs had to be made on electric doors, service employees held the doors while the maintenance man adjusted two screws to make a better electrical connection (274-75). The service employees' job descriptions encourage this cooperative effort (299).

The three maintenance department clerks, maintenance employees who use the woodworking shop and storage area, one housekeeping seamstress and the non-engineering department shipping and receiving clerks occupy the Hospital warehouse. Maintenance men periodically go to this warehouse to obtain supplies from the storeroom or to work in the woodworking and storage areas. When trucks delivering supplies to the Hospital arrive, the maintenance men, the maintenance clerks, and the non-maintenance shipping and receiving clerks make up the team unloading the trucks, storing the supplies and bringing them to the Hospital (180-81, 232-33, 390-93, 301-03). For larger jobs, such as when the autoclave was delivered, and for many other deliveries to the Hospital, shelving for example, the maintenance department clerks are not present and house-

keeping employees join the team with maintenance employees to unload the trucks (308-09).

Moreover, there is a great degree of identity of duties and functions between service and maintenance personnel. Maintenance employees clean, sweep and mop just as service employees do (171, 222, 235, 257-58, 317, 460). Maintenance employees repair things throughout the Hospital just as the seamstress does (291).*

(iii) Common Skills. The maintenance employees are not skilled employees. Their work logs show that most of their work is relatively unskilled -- using plungers or chemicals to unclog drains, changing light bulbs, fixing windows, making minor adjustments, lubricating, changing filters, etc. (23-122, 200-07, 223-28, 242-45). The Hospital subcontracts its more difficult work because "We just don't have the skills in house to do that" (184, 297). Accordingly, sheet metal

* This is also true of the preventive maintenance man whose duties and position came into being after the SLRB certification (422). Except for the repair of small portable Gumco machines that central supply clerks bring to him and nursing assistants use to assist patients with respiratory problems (400, 414, 415-18) and the tests of the static electrical conductivity of the operating room floor that he makes monthly (399-400, 410-11), he is a Hospital clerical employee and as such, a service employee. He sits in his office and spends most of his time on the telephone talking with employees from other departments throughout the Hospital (393, 310, 418-20) and doing paperwork (423, 427-35). He has no prior education, training or experience in maintenance work. His prior experience was clerical and he learned the little bit of Gumco and conductivity work he does on the job (402-03, 414-15).

work, including the installation of the metal, is subcontracted (182). So is the installation of 600 ampere switches and feeders connected to it (184). So is the installation of formica mini-counters (185), the installation of fences that must be imbedded in concrete (186-87), and the trenching for conduits (188). For the same reasons, the Hospital subcontracts the rewinding of motors (207-08), and all major work on the air-conditioning system (218, 250), the washing machines (240), the Somat machine (248-49), the elevators (320), and the oxygen system (241). Subcontractors even repair larger windows (238).

Indeed, Jorge Lopez was the only witness the Board's General Counsel called who claimed to be skilled and insisted on calling himself a plumber rather than a maintenance man (366, 436). But, the Hospital only hires people who can handle a variety of work and hired employees, even into the former craft titles, with no training, apprenticeship or experience in the particular craft whatsoever (380, 402-03). Lopez is the most highly skilled maintenance man at plumbing work (301), but he incredibly claimed that as a plumber he never does any work except plumbing work (443, but compare 439), that as a plumber he never unstopped a sink or toilet (451), and that he was (a) the Hospital's sole plumber and (b) one of its two plumbers (448). However, Lopez, and General Counsel's witness, Phillips conceded that Lopez's alleged

fellow "plumber", Torres (413, 448), changes light bulbs, unclogs toilets and fixes beds (425, 452-53). Lopez, the General Counsel's best example of a skilled maintenance employee is not a journeyman plumber -- he has no license, no education in plumbing, and no apprenticeship. The Hospital hired him as an incinerator man, without prior experience in plumbing, and he learned all the plumbing he knows on the job (436, 446, 446).

The Hospital does not require any maintenance employee to have a license, except the five remaining watch engineers. The one employee who has an electrician's license does not use it on his Hospital job (187-88, 189, 282). Phillips, the preventive maintenance man, was likewise hired without training, education, apprenticeship or experience (402-03, 414-15). Jonas Hunter, a boiler mechanic and the last of the Board's General Counsel's witnesses, obtained various "certificates of fitness" that he does not need for the job during the 25 years the Hospital has employed him, and had no training, education, apprenticeship or experience before the Hospital hired him (454-55, 463).

(iv) Common Wages, Hours, Benefits and Other Conditions of Employment. There is no uniformity of hours among the maintenance employees. Some of them work a Monday to Friday day shift as do some of the service employees. The

remainder of the maintenance employees provide three shift, seven day coverage as do many service employees (23-40, 278). The hours that the maintenance department employees work do not set them apart, but on the contrary, mirror the hours the other Hospital employees work.

The same is true with respect to rates of pay. The maintenance employees share a single unified wage scale of eight grades with the service employees (322, 366-67).^{*} Both service and maintenance employees range from one end of that scale to the other. Both a highly paid watch engineer from the engineering department and the highly paid chef, a service job, share grade 8 at the top of the scale (328). Similarly, the laborer from the engineering department and the food service worker from the dietary department are at the bottom of the same scale -- grade one (322-23). The same is true of the bulk of the engineering department employees -- the firemen and maintenance men -- who like the senior EKG technicians, gardener and cine-technician in other departments receive wages within pay grade four on the unified wage scale (326).

Every program, benefit, facility or advantage the Hospital provides is given to maintenance employees on pre-

* Forty-five employees both within and without the engineering department are paid "red circle" rates above the maximum for their grades (387-89).

cisely the same basis as it is given to every other Hospital employee.*

(v) Common Labor Relations Policy, Common Seniority List and Employee Interchange. Every labor relations and personnel function at the Hospital is centralized and identical for maintenance as well as service employees. The Hospital's centralized personnel department recruits and screens all applicants for all jobs, and reviews all proposed discipline for all employees, including maintenance and service employees (124-26, 270, 336, 339-40, 342). Indeed, the Hospital's Executive Director personally reviews all proposed discharges before they can take effect (271, 336-37).

The Hospital also provides a single unified grievance procedure that may involve supervisors from several departments (19, 373-75, 404-06).

Similarly, the Hospital fills vacancies by inter-departmental promotions and inter-departmental transfers on

* These benefits include: ten paid holidays, two free or floating personal days, Blue Cross, Blue Shield, major medical insurance benefits, dental insurance benefits, prescription drug insurance benefits, life insurance benefits, disability insurance benefits, tuition refund program, paid jury duty leave, paid vacations, fully paid pension plan, leaves of absence, paid time off to vote, paid marriage leave, paid paternity leave, paid funeral leave, military leave of absence with income supplementation, tax shelter annuity plan, payroll savings plan, monthly investment plan, Hospital services discount program, cafeteria discount, accident insurance plan, softball team membership, bowling league participating, service awards program, employee activity committee and management training courses (328-35, 337-38, 339, 367-68, 464-65).

the basis of employees' Hospital seniority -- not departmental seniority (123, 339-41, 345). The public relations office posts a list of job vacancies each month in locked bulletin boards above the Hospital's only bank of time clocks, at the cafeteria entrance and elsewhere. This list remains posted until the Hospital replaces it with the next monthly list (124-26, 468-74). These lists include job vacancies in all Hospital departments (124-26).

Five employees now assigned to maintenance jobs, including maintenance men Maximino Rodriguez and Monserrate Vasques, formerly worked in other departments such as housekeeping and dietary (127-34, 346-53). Two former maintenance employees, Erick Dandy and Wilfredo Franco, are now employed in the Hospital's central sterile supply and housekeeping departments, respectively (135-36, 353-55).

Additional facts appear in the argument.

ARGUMENT

POINT I

THE ACT PRECLUDES THE BOARD FROM GRANTING COMITY TO THE SLRB'S CONTESTED BARGAINING UNIT DETERMINATION IN THIS CASE.

A. The Act's Express Terms Bar Comity.

Section 9(b) of the Act, 29 USC §159(b), provides, in pertinent part, that

"The Board shall decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this Act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof. . . ." (Emphasis added.)

But here the Board ignored this command, abdicated its statutory duty to "decide. . . the unit appropriate for. . . collective bargaining" and instead, without considering the facts in the record, granted comity to the SLRB's unit decision rendered thirteen year earlier under a different statute.

In Memorial Hospital of Roxborough v. NLRB, 545 F.2d 351 (3d Cir. 1976), the Court of Appeals for the Third Circuit faced with facts similar but less compelling than those present here, refused to enforce a Board order requiring the Roxborough hospital to bargain with a craft union concerning a unit limited to maintenance employees that the Pennsylvania Labor Board had found appropriate in a contested case. The Board in Roxborough, as here, grounded its decision solely on comity, and the court, correctly analyzing that doctrine, concluded that the Board had ignored the terms of the Act, had abdicated the responsibilities the Act imposes on it, had ignored the Act's purpose that its legislative history disclosed, had arbitrarily misapplied its comity doctrine, and had arbitrarily and without explanation departed from its own precedent.

Here, instead of accepting the Third Circuit's direction to do its duty and decide for itself whether the Hospital's maintenance employees, alone and apart from the Hospital's other blue collar employees, constitute an appropriate collective bargaining unit, the Board compounded its error and held that

"With all due respect for the views expressed by the Court of Appeals...[in Roxborough], we respectfully adhere to the Board majority's opinion in that case...until such time as the Supreme Court shall have passed on the matter."
(521)

But the Third Circuit's analysis is correct, is in accord with (1) Board member Penello's dissenting opinion in Roxborough, 220 NLRB 402, 405, 90 LRRM 1369, 1371 (1975), (2) former Board member Kennedy's dissenting opinion in Roxborough, 217 NLRB 520, 89 LRRM 1033 (1975), and (3) Board Regional Director Danielson's decision in Society of New York Hospital, 2-CA-13708 (1975) (137-38), and this Court should accept it here. Indeed, as the Third Circuit concluded, there can be no other valid reading of the Act. 545 F.2d at 360.

The Act itself provides that "[t]he Board shall decide in each case. . .the unit appropriate for. . .collective bargaining" and this language compels the Third Circuit's conclusion that

"Congress has thus mandated Board determination in each case of the unit appropriate for collective bargaining. [Footnote omitted.] Thus the statute requires the Board to exercise its discretion as to an appropriate unit in each and every case. This responsibility can neither be delegated to nor discharged by a state agency where Congress has sought to create a national labor policy by vesting this discretion in a national board. La Crosse Telephone Corp. v. Wisconsin Employment Relations Board, 336 U.S. 18, 24-27, 69 S. Ct. 379, 93 L Ed. 463 (1948). Here, however, the Board abdicated its required duty by accepting the PLRB determination without exercising its own mandated discretion. In so doing the Board 'overstep[ped] the law.' Packard Motor Car Co. v. NLRB, supra, . . . 330 U.S. at 491, 67 S. Ct. 789. This conclusion follows not only from the text of the NLRA, but also from the legislative history of the non-profit hospital amendments." 545 F.2d at 360.*

B. The 1974 Legislative History Bars Comity.

The legislative history of Public Law 93-360, the 1974 amendments to the Act that gave the Board jurisdiction over the non-profit hospitals, precludes the Board's grant of comity to a state agency's bargaining unit determination

* In analagous circumstances, the Board will not defer to arbitrators' awards regarding appropriate bargaining units since such issues are "the obligation of the Board." See e.g., Combustion Engineering, Inc., 195 NLRB 909, 912, 79 LRRM 1577, 1579 (1972); Woolwich, Inc., 185 NLRB 783, 784, 75 LRRM 1191, 1193 (1970); and Westinghouse Elec. Corp., 162 NLRB 768, 64 LRRM 1082 (1967) where the Board, after reviewing the facts, rejected an arbitrator's bargaining unit determination in the arbitration proceeding the Supreme Court directed in Carey v. Westinghouse Elec. Corp., 375 U.S. 261 (1964). See Note, The NLRB and Deference to Arbitration, 77 Yale L. J. 1191, 1196-98, 1219-20 (1968).

in a hospital case even if we assume, contrary to law, that the Board could grant comity to such a determination in an industrial setting. First, the committee reports of both houses of Congress direct the Board to avoid proliferation of bargaining unit at hospitals:

"Due consideration should be given by the Board to preventing proliferation of bargaining units in the health care industry. In this connection, the Committee notes with approval the recent Board decisions in Four Seasons Nursing Center, 208 NLRB No. 50, 85 LRRM 1093 (1974), and Woodland Park Hospital, 205 NLRB No. 144, 84 LRRM 1075 (1973), as well as the trend toward broader units enunciated in Extendicare of West Virginia, 203 NLRB No. 170, 83 LRRM 1242 (1973)." Legislative History of the Coverage of Nonprofit Hospitals Under the National Labor Relations Act, 1974 at 12, 274-75. (Hereafter cited as "Legislative History 1974".)

Moreover, Senator Taft, a supporter of the bill that became law (Legislative History 1974 at 258), referred to this Committee report and explained the dangers of proliferation as follows:

"I believe this is a sound approach and a constructive compromise, as the Board should be permitted some flexibility in unit determination cases. I cannot stress enough, however, the importance of great caution being exercised by the Board in reviewing unit cases in this area. Unwarranted unit fragmentation leading to jurisdictional disputes and work stoppages must be prevented.

"The administrative problems from a practical operational viewpoint and labor relation viewpoint must be considered by the Board on this issue. Health-care institutions must not be permitted to go the route of other industries, particularly the construction trades, in this regard.

"In analyzing the issue of bargaining units, the Board should also consider the issue of the cost of medical care. Undue unit proliferation must not be permitted to create wage 'leapfrogging' and 'whipsawing'. The cost of medical care in this country has already skyrocketed, and costs must be maintained at a reasonable level to permit adequate health care for Americans from all economic sectors." Legislative History 1974, at 114.

Therefore, it is clear, as the Third Circuit concluded in Roxborough, that ignoring the record by granting comity to a state agency's unit determination would fly in the face of the intent of Congress that the Board pay particular attention to unit issues at hospitals. 545 F.2d at 361.

Second, the 1974 legislative history expressly shows that Congress wanted uniform national labor law to apply to labor relations at health care institutions -- not different law in different states. Amendments were offered in both houses of Congress to save state laws such as New York's Labor Relations Act, from being preempted by federal law, but the bills' sponsors, Senator Taft and Representative Thompson, opposed these amendments to insure that the law governing labor relations at hospitals would be uniform throughout the

country, and the amendments were defeated. Legislative History 1974 at 117-18, 315-22.

Thus, the Board's granting comity to the SLRB's unit determination at the Hospital not only insures the undue proliferation of hospital bargaining units, which Congress told the Board to avoid, but also gives effect to the New York Act's unit criteria to the exclusion of the national criteria Congress told the Board to develop, and contrary to Congress' express rejection of amendments that would have saved state legislation from preemption. This is further reason why the Board's order should not be enforced.

C. The Cases On Which the Board Relies to Justify Its Failure to Do Its Statutory Duty to Decide the Appropriate Unit Do Not Justify that Failure.

In Roxborough, the court concluded that none of the comity cases on which the Board relied in that case and relies in this case (490)* involved the Board's abdication of its duty under the Act to determine appropriate bargaining units. In each of the cases the Board relied on in Roxborough -- Bluefield Produce & Provision Company, 117 NLRB 1660, 40 LRRM 1065 (1957), The West Indian Co., 129 NLRB 1203, 47 LRRM 1146 (1961) and Screen Print Corporation, 151 NLRB 1266, 58 LRRM 1641 (1965) -- as well as in the two cases the Board relied on

* Of course, here the Board relies on its Roxborough decision too (490, 521).

in Bluefield, viz., Olin Mathieson Chemical Corporation, 115 NLRB 1501, 38 LRRM 1099 (1956) and T-H Products Company, 113 NLRB 1246, 36 LRRM 1471 (1955) -- the employer and the union had stipulated to the bargaining unit in which a state agency conducted an election and the employer was not contesting the appropriateness of the unit before the Board. With the appropriateness of the unit not in issue, the Board was not required to, and did not decide whether or not, to grant comity to a state agency's bargaining unit determination. Hence, these cases do not support the Board's granting comity to the SLRB's bargaining unit determination in this case.*

Here, the Hospital has contested the bargaining unit issue for 13 years. Indeed, even the Union originally took the position that the appropriate unit was a single, combined, service and maintenance unit, when it filed its petition with SLRB, and that agency conducted a separate election among the maintenance employees only because it was constrained by state law, inconsistent with the Act, to do so after another union intervened and sought an election in that gerrymandered unit.

Moreover, where the appropriateness of the unit has been contested, the Board has refused to grant comity to state

*. Even if the Board's decisions did grant comity to state agency bargaining unit determinations, which they did not, that would not mean that because the Board defied the Act before, it should be allowed to defy the Act again in this case.

certifications. In Evinrude Motors Div. of Outboard Marine and Mfg. Co., 66 NLRB 1142, 17 LRRM 405 (1946), the CIO had petitioned for certification in a production and maintenance unit. The IAM intervened to claim that the toolroom constituted a separate appropriate unit. IAM relied on its recent state labor board certification as the representative of Evinrude's toolroom employees and insisted that the Board accord this certification comity.

In refusing comity the Board noted that the Wisconsin law pursuant to which the state labor board had certified the IAM, like the New York Labor Law, limited the discretion of the state labor board and required it to grant a self-determination election once it determined that the petitioned for unit comprised a craft. The Board therefore refused comity concluding:

"Were this Board, without independent investigation, to adopt as decisive the unit determination of the Wisconsin Board, which was premised solely upon the preliminary finding that the toolroom employees comprised a separate craft and division, it would be ignoring completely its obligation under the National Labor Relations Act and its own substantive law. We, who have -- and are required to exercise -- discretion in this matter, cannot be bound by the determination of an agency which had no choice under the State Statute but to conduct a separate craft election. Our desire to coordinate our action with the action of State agencies continues strong, but that desire cannot

prevail on this particular set of facts."
66 NLRB at 1145, 17 LRRM at 405.

Accord, Wilson-Hurd Mfg. Co., 68 NLRB 853, 18 LRRM 1172 (1946).*

In short, as the Third Circuit noted in Roxborough, 545 F.2d at 360, there is simply no Board or judicial authority to support the Board's grant of comity to the SLRB's bargaining unit determination in this case.

D. Even If This Court Were to Accept the Board's Roxborough Test For Granting Comity to State Agency Bargaining Unit Determinations, This Case Does Not Meet That Test.

In Roxborough, the Board said that it would "recognize the results of an election conducted by a responsible state agency, and therefore extend comity to a certification issued pursuant to such an election, where the state agency's election procedures conform to due-process requirements and effectuate the policies of the Act [footnote omitted] ... [, and no] special circumstances exist ... which would require the Board to reexamine the decision made in the [state] representation proceeding." 220 NLRB 402, 403, 90 LRRM 1369, 1370

* The ALJ's attempt in this case to distinguish Evinrude and Wilson-Hurd (491), conveniently overlooks the New York Court of Appeals' holding, quoted at pp. 9-10 supra, that the SLRB's bargaining unit determination at the Hospital was compelled by the mandatory craft proviso in Section 705(2) of the State Act, which does not appear in the National Act. 32 N.Y.2d at 323, 345 N.Y.S.2d at 455, 298 N.E.2d at 618. Hence, his attempt to distinguish these Board cases was invalid and should not be accepted.

(1975), reversed, 545 F.2d 351 (3d Cir. 1976). However, in this case, even assuming that the Board's comity doctrine comports with law, which it does not, the Board should not have granted comity to the SLRB's certification because it does not meet the Board's own comity test.

1. The SLRB's 1964 Certification Does Not Effectuate the Purposes of the Act.

The law that the SLRB applied in making its unit finding in 1964 is so different from and inconsistent with the Act that there is no place for comity here.

The SLRB based its 1964 bargaining unit decision at the Hospital on Section 705(2) of the New York Labor Law that requires, in contrast with Section 9(b) of the Act,

"[T]hat in any case where the majority of employees of a particular craft, or in the case of a non-profitmaking hospital or residential care center where the majority of employees of a particular profession or craft, shall so decide the board shall designate such profession or craft as a unit appropriate for the purpose of collective bargaining." (Emphasis added.)

In enforcing the SLRB's order, the New York Court of Appeals noted that the SLRB's fragmented unit determination was not arbitrary or capricious under the state law since the SLRB had "avoided more serious fragmentation into numerous smaller units ... under the mandatory craft unit provision of

[Section 705(2)]" 32 N.Y.2d at 323, 345 N.Y.S.2d at 455, 298 N.E.2d at 618 (Emphasis added.)

Section 9(b) does not so limit the Board but on the contrary, requires it to exercise full discretion in determining the unit for collective bargaining.

The ALJ and the Board, erroneously equated section 9(b)(2)* of the Act with Section 705(2) of the New York Law. However, these provisions are different and for the reasons discussed below, application of the principles contained in the Act, as the Board interprets it, would have precluded the SLRB unit determination in this case to which the Board erroneously granted comity.

Unlike the mandatory craft proviso in the New York statute, the craft severance proviso in Section 9(b)(2) of the Act deals solely with craft severance from an established unit and in no way purports, nor was it intended, to limit the Board's discretion in making initial unit determinations, which is what this case involves. As is clear from its face and from its legislative History, Section 9(b)(2) of the Act,

* Section 9(b)(2) states:

" ... the Board shall not ... (2) decide that any craft unit is inappropriate for ... [collective bargaining] on the ground that a different unit has been established by a prior Board determination unless a majority of the employees in the proposed craft unit votes against separate representation. ..."

which was part of the Taft-Hartley amendments of 1947, (a) was intended to broaden, rather than narrow the Board's discretion, and (b) comes into play, on its face, only when craftsmen already have been bargaining on a broader "industrial" basis.

The majority Senate Report said that 9(b)(2) was intended only to permit craft units to be "carved out" of pre-existing "comprehensive plant units":

"Since the decision in the American Can case (13 N.L.R.B. 1252), where the Board refused to permit craft units to be 'carved out' from a broader bargaining unit already established, the Board, except under unusual circumstances, has virtually compelled skilled artisans to remain parts of a comprehensive plant unit. The committee regards the application of this doctrine as inequitable. Our bill still leaves to the Board discretion to review all the facts in determining the appropriate unit, but it may not decide that any craft unit is inappropriate on the ground that a different unit has been established by a prior Board determination." Legislative History of the Labor Management Relations Act of 1947 ("Legislative History 1947") at 418.

Again, in the section-by-section analysis, this Senate Report said

"In determining whether members of a craft may be separated from a larger unit the Board may not dismiss a craft petition on the ground that a different unit has been established by a prior determination. This overrules the American Can rule (supra)." Legislative History 1947 at 431.

On the Senate floor, Senator Taft* stressed the fact that Section 9(b)(2) increased rather than limited the Board's discretion as follows:

"All this bill does is to provide that such a previous finding shall not have that effect, and that if a year later the craft people want to form a separate union they shall have the same consideration at that time as they would have had if they had taken that action when the plant was first organized. In effect I think it gives greater power to the craft units to organize separately. It does not go the full way of giving them an absolute right in every case; it simply provides that the Board shall have discretion and shall not bind itself by previous decision, but that the subject shall always be open for further consideration by the Board." Legislative History 1947 at 1009 (emphasis added).

Therefore, contrary to the ALJ's holding (491-93), Section 705(2) of the New York statute and Section 9(b)(2) of the National Act are not the same in purpose, language or application. The State act, as the SLRB and the courts interpret it, removes the SLRB's discretion with respect to creating initial units while the National Act requires the Board to exercise its discretion before deciding the unit issue in both initial and severance cases.

Accordingly, it is clear that the SLRB's decision, compelled by the state's mandatory craft proviso, would not have been the decision of the Board under Section 9(b)(2) of

* The bill's sponsor and the father of the Senator Taft who sponsored the 1974 amendments to the Act.

the Act and granting comity to the SLRB's decision here would not "effectuate the policies of the Act."

The ALJ and Board also attempted to rely upon an alleged equal policy against overfragmentation in New York Law and the Act to overcome the differences between the purposes and effects of these laws (492-93). The Act's policy against overfragmentation, contained in its legislative history, is clear recognition of the unique nature of health care institutions, and makes separate maintenance department units at hospitals inappropriate except in the most compelling circumstances, but the New York Labor Law has no policy against overcompartmentalization in its text, in its legislative history or in its application.

The SLRB claimed that it had a policy "against overcompartmentalization of hospitals into numerous small bargain-units." Wyckoff Heights Hospital, 27 SLRB 75, 82-83 (1964). This alleged policy, however, lacking any basis in the statute or its history, was honored only in the breach and resulted in a great multiplicity of balkanized units that the Act does not permit. For example, because of the craft and professional proviso in Section 705(2) of the New York Labor Law, the SLRB permitted separate units of pharmacists, Wyckoff Heights Hospital, 31 SLRB 17 (1968), physical therapists, Trustees of Columbia University, 30 SLRB 364 (1967), and social workers, North Shore Hospital, 37 SLRB No. 22 (1974) that the Board

does not permit. Methodist Hospital of Sacramento, Inc., 223 NLRB 1509, 92 LRRM 1198 (1976). Similarly, the SLRB established separate units for licensed practical nurses contrary to the Board's practice. Compare Wyckoff Heights Hospital, 30 SLRB 254 (1967) with Backus Hospital, 220 NLRB 414, 90 LRRM 1696 (1975) and St. Catherine's Hospital, 217 NLRB 787, 89 LRRM 1070 (1975).

The best example of the SLRB's failure to follow its so-called policy against establishing small bargaining units at hospitals is its treatment of maintenance employees. Because of the craft proviso, the SLRB always established a separate unit for maintenance employees when a union sought one, if the maintenance employees voted to bargain separately. Society of The New York Hospital, 34 SLRB 486, 488 (1971), reversed on other grounds, 40 App. Div. 2d 603, 335 N.Y.S.2d 1000 (1st Dep't 1972), appeal dismissed, 34 N.Y.2d 838, 359 N.Y.S.2d 61, 316 N.E.2d 344 (1974). The Board, on the other hand, has found maintenance units appropriate only in extraordinary cases. Sinai Hospital of Detroit, Inc., 226 NLRB No. 61, 93 LRRM 1269 (1976); Eskaton American River Health Care Center, 225 NLRB No. 97, 92 LRRM 1569 (1976); West Suburban Hospital, 224 NLRB No. 100, 92 LRRM 1369 (1976); St. Francis Hospital Medical Center, 223 NLRB 1451, 92 LRRM 1172 (1976).

This Court, in NLRE v. St. Luke's Hospital Center, 551 F.2d 476, 483 (2d Cir. 1976), already has noted certain

differences between the New York Labor Relations Act and the National Act with respect to the unit placement of professional employees, and the Board has admitted that New York's craft and professional proviso compelled unit fragmentation at hospitals contrary to the policy of the Act when, in rejecting a separate unit of pharmacists, it held that:

"We attach little weight to the New York history [of separate pharmacists units] in view of a state statute, obviously at odds with the health amendment's policy against proliferation of units which mandates a pharmacist unit finding when pharmacists are found to be professionals." San Jose Hospital and Health Center, 228 NLRB No. 6, (Slip opinion at 5), 76-77 CCH NLRB ¶17879 (1977).

In short, the New York statute is so different from the Act on unit questions that the Board's granting comity to the SLRB's unit determinations would not be proper even if the Act did not direct the Board to make its own unit determinations.

Moreover, the Board granting comity to the SLRB's bargaining unit determination flies in the face of the most basic premise underlying the Act -- that a bargaining relationship may be established only if a majority of the employees in an appropriate unit want union representation. Act §9(a), 29 USC §159(a).

If the SLRB had conducted a Globe election among the Hospital's maintenance employees, Globe Machine and Stamping Co., 3 NLRB 294, 299-300, 1A LRRM 123, 125-26 (1937), as the ALJ said it did (491), the SLRB would not have certified the Union since it did not obtain a majority vote under Globe standards.

The SLRB followed its own unique procedure including using a confusing, three question, ballot (533-34) that permitted the Hospital's maintenance employees to vote for the Union to represent them in a separate unit even though a majority of the Hospital's service and maintenance employees rejected the Union as their representative. This result could not have happened in a Globe election under the Act since the Board's Globe ballot, with its single question, eliminates the possibility of a union seeking an all inclusive unit, as the Union did here, being certified on a separate basis. See pp. 6-8 supra. Indeed, if the SLRB had conducted a Globe election, the Union would have lost 325 to 175.

Further, in determining what effect to give to units created before the effective date of the Act's coverage of non-profit hospitals, even the Board has been mindful "of the congressional mandate to achieve stability and uniformity in this industry. . . ." St. Francis Hospital, 219 NLRB 963, 964, 90 LRRM 1083, 1085 (1975) (emphasis added). In St. Francis

the Board did not "attempt to avoid [its] responsibility" by accepting a unit a Connecticut state agency approved, 219 NLRB at 964, 90 LRRM at 1085, even though the employer and the union had stipulated to the unit under state law. The Board noted that "the unit stipulated to by the parties before the [state agency] would be inappropriate by our standards" and that the employer contended "that it was mindful of the [state agency's] proclivity to find departmental units appropriate whc. it decided to stipulate to the unit consisting of laundry, dietary and housekeeping employees" (id. at n. 7). Accord not, even though the employer had stipulated to the unit, either stability nor uniformity would have been furthered by granting comity, and the Board did not do so.

Both stability and uniformity were at issue in North Memorial Medical Center, 224 NLRB No. 28, 92 LRRM 1212 (1976) where the Board was asked to approve a unit of ambulance drivers clearly inappropriate under the Act. There, as here, a full record of the duties of the employees was developed but there, as it arbitrarily refused to do here, the Board analyzed these facts. There, a union had been voluntarily recognized in a unit of ambulance employees in 1961 and seven successive collective bargaining agreements had been entered into with that union. Thus there was much more of a stable flesh and bones collective bargaining relationship seeking federal approval there than could ever be granted

comity at the Hospital. There, as here, there was no express provision of the Act declaring that the unit that the state had certified was inappropriate, but it was inappropriate under NLRB standards. There, unlike here, the employer had never contested the appropriateness of the unit, had voluntarily recognized the union and had had 14 years without a strike under 7 consecutive labor contracts. Here, unlike the circumstances in North Memorial Medical Center, the Hospital did not recognize the Union voluntarily because of its contention that the unit was inappropriate, employed every lawful means to contest the appropriateness of the unit, bargained pursuant to the New York Court of Appeals' order to do so without prejudice to its position that the unit was inappropriate, but did not enter into a collective bargaining agreement with the Union.

The Board noted in North Memorial Medical Center that three of the seven contracts between the Medical Center and the union had been established through interest arbitration under the Minnesota statute that, just as New York's, had substituted arbitration for the right to strike contrary to the design of the National Act. It viewed this as evidence that the collective bargaining had not been harmonious. It also noted that

"[T]he bargaining history in this case took place under the Minnesota statute which permitted the formation of fragmented units

such as the one sought herein. This is in sharp contrast with the principal thrust of the legislative history of the health care amendments of the Act, admonishing the Board to avoid undue proliferation of bargaining units in the health care industry." Slip Opinion at 6, 92 LRRM at 1214 (footnotes omitted).

We submit that if the ambulance drivers' unit in North Memorial Medical Center was not entitled to the Board's approval then a fortiori the unit the SLRB established here is not and that granting comity to the SLRB's certification here would not effectuate the purposes of the Act.

2. Special Circumstances Exist That Prevent the Application of Comity in This Case.

A test the Board used in Roxborough to determine when to apply its comity doctrine is the absence of "special circumstances" that "would require the Board to reexamine the decision made in the [state] representation proceeding". Here it is clear that even if comity could otherwise properly be applied (which it cannot), special circumstances exist that preclude granting comity.

During the 13 years since the SLRB's 1964 certification, the Hospital has closed one major facility, built and opened a new one, modernized its remaining plant, changed the organization of its maintenance department, changed the duties of its maintenance employees, fully integrated its maintenance employees with its service employees, eliminated the need for

craft skills among the maintenance employees, turned over its maintenance supervisors twice, and turned over 89% of the employees who voted in the SLRB's so-called "self-determination" election, all of which precludes the granting of comity to the SLRB's certification. Even if the SLRB were correct, 13 years ago, in according what it called the Hospital's skilled maintenance employees a separate unit, these substantial intervening changes have transformed the unit completely and prevent the granting of comity to the state certification now. Establishing this unit now under the guise of comity would place the Board's imprimatur on a unit grossly inappropriate for purposes of collective bargaining.

Rather than deal with these unique and special circumstances as they exist, the ALJ, whose decision the Board rubber stamped, distorted these circumstances by viewing them separately rather than as a whole as he should have viewed them. He held that neither (a) the mere passage of time (494), nor (b) employee turnover alone (495), nor (c) mere relocation (495-96) constitutes a special circumstance that would void the application of the Board's comity doctrine. This was error, and the Board adopted it.

Here mere time, turnover, or relocation is not the issue -- all three of these circumstances have occurred as well as a change in organization, supervision, and the very work itself. The cumulative effect of this unique set of

facts constitutes special circumstances within the meaning of the Board's invalid decision in Roxborough, and precludes the granting of comity under the Board's own invalid test. Cf. e.g., Argus Optics v. NLRB, 515 F.2d 939 (6th Cir. 1975); Home Town Foods, Inc. v. NLRB, 379 F.2d 241, 244 (5th Cir. 1967) (Board orders refused enforcement because the Board examined each fact in isolation and failed to examine their combined effect).

The stale 1964 SLRB certification to which the Board granted comity was issued 13 years ago for a smaller unit of different employees with greater skills and different duties who worked in different locations on a different engineering plant under different supervision, with a different organizational structure, different rates of pay, different benefits, and with less on-the-job contact with the Hospital's service employees. We can conceive of no circumstances more special than those present in this case.

Since the Board's own test for comity set out in Roxborough is not met here, the Board erred in granting comity even assuming, contrary to law, that comity could otherwise apply.

3. The SLRB Certification is Stale.

In each of the five Board cases cited at page 36 supra where the Board granted comity, the employer refused to

bargain within one year of the date the state certified the union and, in Roxborough, the union filed its refusal to bargain charge less than six months after the state certification, 220 NLRB at 402, 90 LRRM at 1370, well within the one year period following certification during which there is an irrebutable presumption of continued union majority status. Brooks v. NLRB, 348 U.S. 96 (1954).

Here, however, the SLRB's certification expired on March 4, 1975 -- one year after the Supreme Court denied the Hospital's request to review the New York Court of Appeals' bargaining order. Long Island College Hospital v. New York State Labor Relations Board, 415 U.S. 957 (March 4, 1974) -- and the Hospital did not refuse to bargain with the Union until August 14, 1975. By then the one year irrebutable presumption of the union's majority status the SLRB's certification of the Union created had long since expired, Mar-Jac Poultry Co., 136 NLRB 785, 49 LRRM 1854 (1962), and there simply was no certification extant to which the Board properly could grant comity even if the SLRB had certified the Union as the representative of employees in an appropriate collective bargaining unit under National Act standards, which SLRB did not do.

E. The Election the SLRB Conducted Was Not Conducted Under the Board's Standards.

In its decision in Roxborough the Third Circuit, relying on NLRB v. Metropolitan Life Ins. Co., 380 U.S. 438,

443 (1965), held that the Board should "develop and furnish an adequate record sufficient to permit informed judicial review of its actions" in passing on the hospital's complaints about "the state election procedures" that led to the state agency certifying the union. 545 F.2d at 362.

Here too, the Board never passed on the Hospital's objections to the SLRB election, which are described in the trial examiner's decision in the unfair labor practice proceeding before the SLRB (558-67) and are summarized at page 8 supra.

The SLRB rejected the Hospital's objections only because its standards with respect to pre-election conduct and conduct during an election were completely different from the standards the Board applies in similar circumstances. According to the SLRB,

"The term 'laboratory conditions' is neither appropriate nor realistic, and we shall not employ it in the future. The simple fact is that labor elections are not conducted in the isolated and antiseptic surroundings of a chemical, biological or physics laboratory and the analogy is both inappropriate and misleading. * * * *

"In any case, apart from substantial interference with the voting process itself . . . our inquiry is properly directed to a determination of whether there has been interference with either the fact of the employees voting, or how they voted." New York University, 33 SLRB 394, 399 (1970).

On the other hand, in 1964, when the SLRB conducted the election, the Board's standard with respect to pre-election conduct and conduct during an election was

"to assure the employees full and complete freedom of choice in selecting a bargaining representative. The Board seeks to maintain, as closely as possible, laboratory conditions for the exercise of this basic right of the employees. One of the factors which may so disturb these conditions as to interfere with the expression of this free choice is gross misrepresentation about some material issue in the election. It is obvious that where employees cast their ballots upon the basis of a material misrepresentation, such vote cannot reflect their uninhibited desires, and they have not exercised the kind of choice envisaged by the Act." Hollywood Ceramics Co., 140 NLRB 221, 223, 51 LRRM 1600-01 (1962) (Footnotes omitted.)

Although the Board retreated this year from Hollywood Ceramics with respect to pre-election campaign propaganda, Shopping Kart Food Market, Inc., 228 NLRB No. 190, 94 LRRM 1705 (1977), it continues to apply its "laboratory conditions" standard to other types of pre-election misconduct and conduct concerning the voting process itself.

Since the SLRB election in this case took place 13 years ago, it is impossible at this late date to litigate the Hospital's objections to that election before the Board so that the Board may apply its own standards for a free election to the Union's conduct, as the Third Circuit's holding in Roxborough requires.

Hence, if this Court mistakenly were to hold, contrary to the Third Circuit, that the Board properly granted comity to the SLRB's bargaining unit determination, it should, at the very least, remand the case to the Board to hold a new election so that the maintenance employees, 89% of whom did not vote in the SLRB election, may vote in a free and fair election conducted according to the Board's, not the SLRB's, standards.

POINT II

THE MAINTENANCE UNIT THE SLRB FOUND APPROPRIATE 13 YEARS AGO IS INAPPROPRIATE UNDER THE ACT AND THE BOARD'S OWN STANDARDS. HENCE, THE BOARD WOULD NOT HAVE CONCLUDED THAT THE HOSPITAL'S MAINTENANCE EMPLOYEES ARE AN APPROPRIATE COLLECTIVE BARGAINING UNIT HAD IT CONSIDERED THE FACTS IN THE RECORD AS THE ACT REQUIRES IT TO DO.

The Hospital's maintenance employees in the unit the SLRB certified 13 years ago do not possess a community of interest separate and distinct from the community of interest they share with other Hospital employees. Every single factor militates against segregating them in a separate unit. There are no material differences between the wages, hours and other conditions of employment of maintenance employees and other employees. Indeed, the maintenance employees are not a homogeneous group, but rather range from watch engineers, with responsible jobs, to unskilled incinerator men who work with housekeeping, laboratory and dietary employees disposing of

garbage and, because of the diverse nature and location of their work, maintenance employees have more contact and teamwork with service employees than with each other.

The Board's bargaining unit decisions in hospital cases show that hospital maintenance employees may constitute a separate appropriate unit only on the clearest showing that they are highly skilled and work apart from, and hence have no community of interest with, the hospital's service employees. Anaheim Memorial Hospital Association, ("Anaheim"), 227 NLRB No. 25, 94 LRRM 1058 (1976), Sutter Community Hospitals of Sacramento, Inc., ("Sutter"), 227 NLRB No. 18, 76-77 CCH NLRB ¶17641 (1976), Greater Bakersfield Memorial Hospital, ("Bakersfield"), 226 NLRB No. 143, 93 LRRM 1389 (1976), Baptist Memorial Hospital, ("Baptist"), 224 NLRB No. 51, 92 LRRM 1223 (1976), St. Joseph Hospital, ("St. Joseph"), 224 NLRB No. 47, 92 LRRM 1209 (1976), Riverside Methodist Hospital, ("Methodist"), 223 NLRB 1084 92 LRRM 1033 (1976), Jewish Hospital Association of Cincinnati, ("Jewish"), 223 NLRB 614, 91 LRRM 1499 (1976), Metropolitan Hospital, ("Metropolitan"), 223 NLRB 282, 91 LRRM 1429 (1976), Shriners Hospitals, ("Shriners"), 217 NLRB 806, 89 LRRM 1076 (1975).

In these nine cases, the Board held that the maintenance employees were not an appropriate bargaining unit, and the facts of this case compel the same conclusion. Thus, the Board's naked unsupported and unreasoned conclusion to the

contrary based solely on comity, and reached without considering the facts in the record that compel the contrary conclusion, is arbitrary and capricious and precludes enforcement of the Board's order. NLRB v. Metropolitan Life Ins. Co., 380 U.S. 438, 443 (1965).

In Jewish the Board concluded that separate units for maintenance employees might be appropriate only in the rarest cases where the maintenance employees consist of highly skilled craftsmen sharing a community of interest among themselves and no community of interest with a hospital's service employees. Specifically, the Board found that the separate maintenance-engineering unit a union sought in Jewish was not an appropriate unit because the traditional grounds for establishing a separate maintenance unit did not exist, as they do not exist here, and because of the congressional mandate against proliferation of bargaining units at health care institutions set out in the Senate and House committee reports that we quote at page 31 supra.

In Woodland Park Hospital, 205 NLRB 888, 84 LRRM 1075 (1973), one of the Board's decisions that the Senate and House committees "note[d] with approval" (Legislative History 1974 at 12, 274-75), the Board dismissed the petition of a union seeking to represent a unit limited to Woodland's maintenance employees for the sole reason that the maintenance employees, without Woodland's service employees, were an

inappropriate unit for collective bargaining. Moreover, in Four Seasons Nursing Center, 208 NLRB 403, 85 LRRM 1093 (1974) and Extendicare of West Virginia, 203 NLRB 1232, 83 LRRM 1242 (1973), the other health care facility cases the Congressional committees also "note[d] with approval", the Board directed elections in bargaining units that included both maintenance and service employees in the same unit. It is clear, therefore, that Congress directed its attention to the very issue presented here, whether maintenance employees should have separate units, and considered such separate units the "proliferation" it cautioned the Board to avoid. See also, the remarks of Senator Taft, one of the sponsors of the 1974 amendments to the Act, (Legislative History 1974 at 114) that we quote at pages 31-32 supra showing that Congress was directing the Board to prevent "[u]nwarranted unit fragmentation leading to jurisdictional disputes and work stoppages"

We submit that the legislative history shows Congress' clear intent to preclude the Board from finding separate maintenance units appropriate as a matter of law, but the Court need not go that far in this case because the Board's own decisions show conclusively that even if a separate maintenance unit might be appropriate at some hospitals, the Board would not have found a unit appropriate here had it considered the facts in the record as the Act requires it to do.

In each of the nine cases cited at page 54 supra, the Board discussed many factors that required placing maintenance employees in a unit together with service employees and not segregating them in a separate, balkanized unit. These factors exist at the Hospital and point even more strongly than the factors at the hospitals in those cases to the gross inappropriateness of the unit of maintenance employees that the SLRB certified at the Hospital.

As in Anaheim, Bakersfield, Baptist, St. Joseph, Methodist, Jewish and Metropolitan, the Hospital's centralized personnel office performs all personnel functions, including hiring, for maintenance employees and for all other employees. Indeed, the stationary engineers in Shriners did not constitute a separate appropriate unit even though their department head hired them directly rather than through the central administration unlike all the other employees except registered nurses. In Anaheim, Bakersfield, Baptist, St. Joseph, Methodist, Jewish, Metropolitan and Shriners, as here, the maintenance employees and all other Hospital employees received the same benefits on an equal basis. Indeed in Sutter, the maintenance employees did not constitute a separate appropriate unit even though they had a different shift differential and overtime computation method from employees in other departments, and in Metropolitan they did not constitute a separate

unit even though they participated in different pension and welfare plans than the service and technical employees.

As in Jewish, the maintenance employees working at night and on weekends at the Hospital report to a nursing supervisor to whom all other employees on duty also report. Even in the day time the Hospital's maintenance employees take orders from non-maintenance supervisors as did the maintenance employees in Anaheim, Jewish and Metropolitan. Moreover here, as in Methodist and St. Joseph, many of the Hospital's service employees, e.g., laundry and housekeeping employees, as well as maintenance employees, report to the same Associate Administrator, but even the fact that non-maintenance supervisors did not supervise maintenance employees in Bakersfield, as they do here, did not make a separate maintenance unit appropriate there.

Here, as in Sutter, "[f]or example, [employees] employed in the engineering and maintenance department work at the same wage scale as the Hospital's [housekeeping employees]". (Slip Opinion at 6). Here, much more so than in Anaheim, Bakersfield, Jewish and St. Joseph, the pay rates of the maintenance employees are the same as the pay rates of comparably skilled service employees from the bottom of the wage scale they share all the way to the top.

By contrast, the Board did not find a separate maintenance unit appropriate in Shriners, where the stationary

engineers' wages were different from those of all other employees, nor in Methodist where maintenance wages were higher across the board. Certainly a separate maintenance employees' unit cannot be appropriate here where the wages of service and maintenance employees are virtually the same from one end of the wage scale to the other.

In Baptist, St. Joseph, Methodist, Jewish and Metropolitan, as here, maintenance employees share a single cafeteria with non-maintenance employees and the fact that the maintenance employees in Bakersfield, unlike the maintenance employees here, "[took] their lunch break at a time different from other employees" and "[ate] together in the engineering plant" rather than the cafeteria used by all other employees, did not make the maintenance unit appropriate there (Slip Opinion at 9).

In Anaheim, Jewish and Metropolitan, as here, all employees shared a single time clock, but even if they did not, as in Methodist and Bakersfield, this would not destroy the strong community of interest they share with other Hospital employees that precludes a separate maintenance unit.

In Jewish and St. Joseph, as here, some of the maintenance employees and some employees from other departments worked the Monday through Friday day shift while other employees, both within and without the maintenance department, provided around the clock seven day coverage. In Shriners,

only the maintenance employees and nurses worked around the clock and in Anaheim only the maintenance employees rotated, one at a time, to provide coverage on the night and evening shifts. Indeed, in Methodist and Metropolitan the maintenance employees did not constitute a separate appropriate unit even though there was some difference in starting times between maintenance and all other departments and only the maintenance employees worked a unique ten hours a day, four days a week schedule. Thus, the work schedules of maintenance employees at the Hospital compel the conclusion that they do not constitute an appropriate bargaining unit, particularly in light of the work schedules of the maintenance employees at Anaheim, Methodist, Metropolitan and Shriners.

Further, here, as in Bakersfield, St. Joseph, Jewish and Metropolitan, the Hospital's maintenance employees have certain work and storage areas throughout the Hospital that they share with service employees (in Methodist there was no evidence that these areas were shared). In Anaheim the maintenance employees worked out of separate maintenance buildings. There, as here, the maintenance employees admittedly spent very little time in their own areas (214, 307, 450) and spent the vast majority of their time working outside of these areas and throughout the Hospital. The many work and storage areas in this case that maintenance employees use tend to fragment rather than create a community of interest

among all of the maintenance employees. In fact, all employees of every Hospital department have a work area (310) and the fact that some maintenance areas are located away from others means that the maintenance employees have less contact with each other than they do with employees of other departments.

Most maintenance employees at the Hospital, but not all of them, wear blue uniforms; so do housekeeping employees. All maintenance employees who perform work in the operating room wear the same green uniforms as do all other operating room personnel. As in Jewish, maintenance employees who do painting work wear white, as do nurses, but this does not suggest that they share a community of interest any more than registered nurses and nurses aides share a community of interest or that housekeeping employees who wear blue, have a community of interest separate from the dietary workers who wear yellow (237, 277-78, 437-38, 457).

Here, as in Metropolitan, the Hospital employs "a diverse group ranging from unskilled. . .to relatively skilled" maintenance employees, and "none of the maintenance employees have [sic] journeyman status." (223 NLRB at 282, 283). Such diversity also existed in St. Joseph (Slip Opinion at 4 n. 5), Sutter (Slip Opinion at 13), and Anaheim (Slip Opinion at 7). In Methodist, the maintenance employees "range from unskilled laborers to relatively skilled craftsmen and

technicians with widely disparate backgrounds, training and skills." (Slip Opinion at 4). But unlike Methodist (Slip Opinion at 5), none of the Hospital's maintenance employees had prior training and experience and none is a relatively skilled craftman or technician.

In Bakersfield, Jewish, St. Joseph, Methodist, Baptist and Metropolitan the Board, in holding that a maintenance unit was not appropriate, stressed the fact that the more skilled maintenance work was subcontracted, and it is here too, but to an even greater degree.

In St. Joseph (Slip Opinion at 7) and Sutter (Slip Opinion at 8-10), a maintenance unit was inappropriate even though the hospital looked "for individuals who were trained specialists in the various crafts capable of using the customary tools of the trade in a skillful manner", which the Hospital here does not do. Here, the Hospital's maintenance employees, like those in Anaheim, Bakersfield, Shriners and Baptist, are not required to have and in fact do not have prior education, training, apprenticeship or even experience and are not licensed. As did the maintenance employees in Bakersfield and Baptist, the Hospital's maintenance employees learned what they know on the job without any formal on-the-job training program. Their work, in significant part, consists of unstopping toilets and changing light bulbs in contact with other employees throughout the Hospital,

as in St. Joseph. Indeed, in Jewish the maintenance employees did not constitute a separate appropriate unit even though, unlike the situation here, "90 percent" of that Hospital's maintenance employees were skilled "journeymen level craftsmen" such as plumbers, electricians, etc. (223 NLRB at 624).

Here, as in Metropolitan, "even those maintenance employees who perform more specialized work . . . spend as much as half their time performing maintenance work of a general nature." (315; 223 NLRB at 282). More so than in Anaheim where the Board noted that some maintenance employees "have acquired skills which make them 'favored' for assignments on electrical work, some on air-conditioning, but all serve as rotating general maintenance men on evening and night shifts" (Slip Opinion at 3), all of the Hospital's maintenance employees perform work, even on the day shift, outside of the work for which they are most favored. As in Bakersfield, the Hospital's maintenance employees are "generally responsible for more routine maintenance work" (Slip Opinion at 9), and, as in St. Joseph,

"Although the craft-like employees perform many tasks customarily performed by employees possessing [craft titles], they also perform many relatively unskilled tasks. . . . Furthermore, it is clear from the entire record that the great majority of tasks requires only 'handyman' skills in order to service and maintain the degree of efficiency necessary

to achieve the objectives established by the employer." (Slip Opinion at 8) Accord, Baptist (Slip Opinion at 4).

Here, as in Jewish, Anaheim, Methodist and Baptist, the maintenance "employees are required to coordinate their work with service and other employees. They are often assisted by service employees, especially housekeeping department employees, in moving furniture and equipment," and maintenance employees spend most of their time working throughout the Hospital. (Jewish, 223 NLRB at 615-16); Anaheim, Slip Opinion at 4; Methodist, Slip Opinion at 7; Baptist, Slip Opinion at 3. Here, as in Shriners, the maintenance employees work throughout the Hospital "where they come into daily contact with employees assigned to these areas" (217 NLRB at 807). Accord: Sutter (Slip Opinion at 13). Here, as in Metropolitan, "maintenance employees must necessarily work in close cooperation with all other departments, especially housekeeping." (223 NLRB at 283).

"Their contact with other employees is probably at least as significant as those of most hospital employees with other employees outside their immediate departments" Anaheim, (Slip Opinion at 7).

Here, as in Bakersfield, Methodist and Baptist, there is an overlap in duties and functions in that both maintenance and housekeeping employees perform cleaning work and, as in Sutter, "a number of these [maintenance] employees do work

which is similar to that performed by service employees and are paid at the same wage scales" (Slip Opinion at 13).

Here, as in Bakersfield, Metropolitan, Methodist and Jewish, there are interdepartmental transfers and promotions both into the maintenance department from other departments and out of the maintenance department to other departments. Unlike this case, the hospitals in Anaheim and St. Joseph made no transfers from maintenance to other departments, but the maintenance employees still did not constitute appropriate units there. As in Jewish and Methodist, such transfers are facilitated in the Hospital by a job posting and bidding system and in the Hospital this system is based on Hospital-wide, not departmental, seniority. (In Methodist, unlike this case, departmental seniority rather than Hospital seniority was controlling).

In four cases, the Board has held that maintenance employees alone are an appropriate bargaining unit. Sinai Hospital of Detroit, Inc., 226 NLRB No. 61, 93 LRRM 1269 (1976); Eskaton American River Health Care Center, 225 NLRB No. 97, 92 LRRM 1569 (1976); West Suburban Hospital, 224 NLRB No. 100, 92 LRRM 1369 (1976); and St. Francis Hospital Medical Center, 223 NLRB 1451, 92 LRRM 1172 (1976). But in Eskaton the Board relied, in substantial part, on a six year history of collective bargaining, a fact not present here, and in each of these cases, unlike here, the hospital employed craftsmen, trained

specialists or skilled employees to do its maintenance work who had little on-the-job contact with other hospital employees. Thus, under the Board's own unit standards, a unit limit 1 to maintenance employees may be appropriate only in these limited circumstances that do not exist at the Hospital.

The Board's conclusion in Jewish is a compelling summary for this case as well except that there none of the Hospital's maintenance employees is a journeyman level craftsman:

"Here, an examination of these factors establishes that maintenance employees do not have a sufficiently separate community of interest to warrant a finding that a separate unit is appropriate. Engineering department employees share common working conditions and benefits with all hospital employees; share common general supervision during the evening and night shifts; are commonly hired with other employees; work throughout the hospital, spending a large percentage of their time in contact with other employees; transfer to service jobs and vice versa; and, in some cases, perform duties similar to those performed by service employees. While engineering department employees do not provide any direct health care services, in many instances the ability of the hospital to provide the patient care services is dependent on the maintenance employees making necessary repairs to equipment. There is a wide disparity of skill level and function in the engineering department, with the department employees ranging from unskilled laborers to journeyman level craftsmen. It is true that most engineering department employees are at the journeyman level performing functions somewhat different from those of most hospital employees and this factor

tends to favor the establishment of a separate unit. However, hospitals are composed of a number of departments each of which, in a general sense, could be said to be made up of skilled employees performing duties which are functionally distinct. The real question is whether the distinctions between engineering department employees and the employees in other departments show such separate interests as to warrant granting engineering department employees a separate unit while not permitting skilled employees in other departments the same privilege. In the absence of any other factors which favor a separate unit, we find that they do not." (223 NLRB at 616-17). (Emphasis added.)

In sum, the facts here compel the sure and certain conclusion that the Hospital's maintenance employees are not an appropriate unit for the purposes of collective bargaining, and the Board's statement to the contrary, devoid of explanation or reason, is arbitrary and capricious and should not be enforced. NLRB v. Metropolitan Life Ins. Co., supra.

POINT III

THE BOARD'S EXTRAORDINARILY BROAD ORDER THAT NEITHER THE BOARD'S GENERAL COUNSEL NOR THE UNION REQUESTED FURTHER SHOWS THE BOARD'S ARBITRARY AND CAPRICIOUS ACTIONS IN THIS CASE AND IN ALL EVENTS IS UNLAWFUL IN VIEW OF THE TECHNICAL NATURE OF THE ALLEGED VIOLATION

Although the Hospital refused to bargain with the Union solely to test, in the only way it could, the appropriateness under the Act of a bargaining unit limited to a small fraction of its blue collar employees, the Board adopted the ALJ's improper extraordinarily broad injunctive order

(497-98) without commenting on the Hospital's exceptions to it (511-13), and even though neither the Board's General Counsel, as prosecutor, nor the Union ever asked for such an extraordinary order either from the ALJ or the Board. This is just another example of the Board's unlawful total disregard of the facts of this case.

The Board's order not only requires "the Hospital, its officers, agents, successors and assigns" to "cease and desist from" refusing to bargain with the Union about the maintenance employees' "wages, hours and other terms and conditions of employment", which is the standard remedy, but also requires the Hospital, its officers, agents, successors and assigns to

"1. Cease and desist from:

* * * *

"(b) In any other manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act." (497-98) (Emphasis added.)

In all but the most flagrant cases, paragraph 1(b) of the Board's order would read just as paragraph 1(b) of the Board's order in Roxborough reads, as follows:

"(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act." 220 NLRB at 405. (Emphasis added.)

The broad injunction against violating the Act in "any other" manner that the Board imposed on the Hospital in this case in contrast to the narrow injunction against violating the Act in "any like or related" manner that the Board imposed on the hospital in Roxborough for the same alleged violation shows that the Board paid no attention to this case and hence did not perform its statutory duty.

Moreover, if this Court mistakenly were to accept the Board's abdication of its statutory duty to decide this case under the Act and were to enforce the Board's order, the Hospital would be risking contempt for any unrelated, unintentional or technical violation of the Act, which is why the Supreme Court does not permit broad orders except where, unlike here, the guilty party has shown a proclivity to violate the Act. NLRB v. Express Publishing Co., 312 U.S. 426, 433 (1941). See also, NLRB v. Entwistle Mfg. Co., 120 F.2d 532, 536 (4th Cir. 1941) upon which the ALJ relied (497), and NLRB v. Beth Israel Hospital, F.2d , 95 LRRM 2230, 2234 (1st Cir. 1977) and the cases the First Circuit cites on this point.

In all events, broad injunctive relief is unwarranted here in light of the technical nature of the Hospital's alleged violation.

CONCLUSION

The Court should grant the Hospital's petition and set the Board's order aside. At the very least, the Court should remand the case to the Board with instructions to make its own decision under the Act concerning whether the maintenance employees at the Hospital are an appropriate collective bargaining unit and, if the Board erroneously finds that they are, to hold a new election under the Board's own election standards.

Respectfully submitted,

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ALFRED W. ROBERTS
COUNSEL

June 24, 1977

BY HAND

A. Daniel Fusaro, Esq.
Clerk, United States Court of
Appeals for the Sixth Circuit
Foley Square
New York, New York

Re: The Long Island College Hospital,
Petitioner v. National Labor Relations
Board, Respondent
Appeal No. 77-4083

Dear Mr. Fusaro:

Enclosed herewith for filing are 10 copies of
Petitioner's Brief and 10 copies of the Joint Appendix in
this matter together with our Notice of Appearance of Counsel.

This will certify that this date I have served one
copy of the Joint Appendix and two copies of Petitioner's Brief
by mailing the same by first class post paid certified mail,
return receipt requested, addressed as follows:

Elliott Moore, Esq.
Deputy Associate General Counsel
National Labor Relations Board
1717 Pennsylvania Avenue, N.W.
Washington, D.C. 20570
(Counsel for respondent)

Everett E. Lewis, Esq.
Vladeck Elias Vladeck & Lewis, P.C.
1501 Broadway
New York, New York 10036
(Counsel for party that has moved to intervene)

KELLEY DRYE & WARREN

A. Daniel Fusaro, Esq.

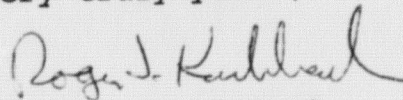
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June 24, 1977

Richard L. Epstein, Esq.
Sonnenschein Carlin Nath & Rosenthal
8000 Sears Tower
Chicago, Illinois 60606
(Counsel for party seeking amicus curiae status)

Please acknowledge receipt of this letter and its
enclosures by stamping the enclosed copy of this letter and
returning it to our messenger.

Very truly yours,


Roger J. Karlebach

RJK:kv
Enclosures

cc: Elliott Moore, Esq.
Everett E. Lewis, Esq.
Richard L. Epstein, Esq.